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**CONTAINS CONFIDENTIAL INFORMATION
TO BE FILED UNDER SEAL PURSUANT TO
STIPULATED PROTECTIVE ORDER SO
ORDERED JANUARY 7, 2008**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEXTEC APPLICATIONS, INC.,
a Georgia corporation, :
Plaintiff, :
v. :
BROOKWOOD COMPANIES, INC.,
a Delaware Corporation. :
Defendant. :
: x
: ECF Case 07-CV-6901 (RJH)(THK)

**MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S
MOTION TO DISREGARD
AND/OR STRIKE THE 30(B)(6)
DEPOSITION TESTIMONY OF
ATLANTIC DIVING SUPPLY,
INC. AND SECTIONS OF THE
AFFIDAVIT OF AMY S. COYNE
AND IN THE ALTERNATIVE
REQUEST FOR LEAVE TO
FILE A SUR-REPLY**

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I.

INTRODUCTION

In support of its Motion for Partial Summary Judgment ("Defendant's Motion"),

Brookwood Companies, Inc. ("Brookwood") filed a reply brief that relies on new evidence

[REDACTED] Plaintiff Nextec Applications, Inc. ("Nextec") respectfully requests that the Court disregard and/or strike the [REDACTED]
[REDACTED] testimony [REDACTED]

proffered by Brookwood. In the alternative, Nextec respectfully requests that the Court allow Nextec to examine the declarant and the basis of her testimony and to file a sur-reply to respond to and address the flaws and inconsistencies in the newly submitted evidence.

**THE ADS TESTIMONY AND PORTIONS OF THE COYNE AFFIDAVIT
SHOULD BE STRICKEN**

A. **The Court Should Disregard and/or Strike the ADS Testimony Proffered by Brookwood**

Brookwood initially took the position that all ADS garments made with Brookwood fabrics were only sold to the Department of Defense under a specific federal contract. (See Def.'s Mem. of Points and Authorities in Support of Defendant's Motion at 6.) This position was important [REDACTED] because, if true, under Title 28, Section 1498 ("Section 1498") Nextec's potential damages for those sales would potentially be available only through suit in the Court of Federal Claims and might be limited to a reasonable royalty without enhanced damages for willful infringement. [REDACTED]

A series of 15 horizontal black bars of varying lengths, decreasing from top to bottom. The bars are evenly spaced and extend across the width of the frame.

Unfortunately [REDACTED], counsel for Nextec produced incontrovertible documentary evidence showing it purchased from ADS's online store a GEN III Level 7 parka manufactured by DJ Manufacturing Corp (*See* Coyne Affidavit Attachment 4.) That commercial purchase put the lie to [REDACTED] Brookwood's initial position. [REDACTED]

the Court

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B. Critical

Should Be Disregarded and/or Stricken by the Court

Faced with undeniable and damning evidence revealing that ADS really did sell garments containing Brookwood fabric in the commercial market, Brookwood [REDACTED] cagily shifted their position from “all” Brookwood fabrics being delivered to the government [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Nevertheless, Brookwood once again failed to provide any evidence

[REDACTED]

[REDACTED]

[REDACTED]

1. Paragraph 6.

Paragraph 6 of the Coyne Affidavit states:

1

Affidavit ¶6 (emphasis in original)). [REDACTED]

[REDACTED], Brookwood [REDACTED]

[REDACTED] still failed to substantiate this statement with any documentary evidence showing that any

GEN III Extended Cold Weather Clothing System uniform [REDACTED]

[REDACTED] to the U.S. Government.

Indeed, the only substantiated evidence before the Court is that ADS sold a GEN III parka [REDACTED]

[REDACTED] in the commercial market.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Paragraph 14

Paragraph 14 of the Coyne Affidavit states [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Furthermore,

[REDACTED] is unsubstantiated – the

² As a 30(b)(6) witness, Ms. Coyne was obligated to investigate and be prepared to testify truthfully and accurately about the topics noticed. [REDACTED]

records [REDACTED] are not proffered to support the [REDACTED], nor has Nextec had an opportunity to examine [REDACTED] [REDACTED] this subject matter despite its subpoena covering these exact details.

Moreover, it strains credibility and common sense that out of the at least [REDACTED] parkas sold to the general public (*See* LeGrand Decl. ¶3, Exh. 2 at 27:11), counsel for Nextec happened to purchase one of the very few [REDACTED]

the Court should strike and/or disregard this testimony.

3. Paragraph 15

Paragraph 15 of the Coyne Affidavit states:

irrelevant because application of Section 1498 requires that the garments containing Brookwood fabric be delivered to and accepted by the Federal Government. *See* Title 48 CFR Section 52.227-1(a)(1). The use of these [REDACTED] [REDACTED] is still an infringing use that is not protected by Section 1498.

4. Paragraph 16, Second Sentence

Paragraph 16, second sentence of the Coyne Affidavit states [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This testimony is speculative and not from personal knowledge. [REDACTED]

[REDACTED]

[REDACTED]

Furthermore, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the Court should strike and/or disregard this testimony.

III.

**ALTERNATIVELY, THE COURT SHOULD GRANT NEXTEC
LEAVE TO FILE A SUR-REPLY**

"Where new evidence is presented in a party's reply brief or affidavit in further support of its summary judgment motion, the district court should permit the nonmoving party to respond to the new matter prior to disposition of the motion." *Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc.*, 767 F.Supp. 1220, 1235 (SDNY 1991) *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992). Here, Brookwood waited until its reply brief to introduce both the ADS Testimony and the Coyne Affidavit. Brookwood may argue that this evidence was not available to it for inclusion in its moving papers. But, that would be disingenuous.

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The image consists of nine horizontal black bars of varying lengths, arranged vertically from top to bottom. The top bar is the longest, followed by a shorter one, then another, and so on until the bottom bar is the shortest. The bars are set against a white background.

Because Brookwood has filed extensive new evidence in support of its motion for summary judgment on reply, Nextec respectfully requests that the Court grant Nextec leave to challenge that new evidence and file a sur-reply to address the new evidence in the event that the Court does not disregard or strike that new evidence.

IV. CONCLUSION

Brookwood failed to provide a single document showing that garments

were delivered to (and accepted by) the United States.

[REDACTED]
[REDACTED]
[REDACTED] the Court should disregard and/or strike that testimony.

Moreover, because there is evidence before the Court conclusively showing [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] the Court should strike and/or disregard ADS's [REDACTED]

[REDACTED] This is particularly true [REDACTED]
[REDACTED] in the context of supporting a motion for summary judgment where all inferences of fact must be made in favor of the non-moving party – Nextec.

In closing, [REDACTED]

[REDACTED] Nextec respectfully requests that the Court either strike that evidence or, alternatively, grant Nextec leave to examine that testimony and to file a sur-reply to address that new evidence.

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Dated: New York, New York
September 5, 2008

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